

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re J.C., JR., a Person Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

C.H. et al.,

Defendants and Appellants.

G057430

(Super. Ct. Nos. 17DP0416,
17DP0416A)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, Anthony C.
Ufland, Judge. Affirmed.

Cristina Gabrielidis, under appointment by the Court of Appeal, for
Defendant and Appellant, C.H.

Donna P. Chirco, under appointment by the Court of Appeal, for the
Defendant and Appellant, J.C.

Leon J. Page, County Counsel, Karen L. Christensen and Deborah B.
Morse, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

* * *

Appellants C.H. (mother) and J.C. (father), parents of minor J.C., Jr. (the minor), appeal the juvenile court's termination of their parental rights and contend¹ the court erred in denying the mother's modification petition made pursuant to Welfare and Institutions Code section 388,² as well as declining to apply the statutory parental benefit exception to the termination of their parental rights. (§ 366.26, subd. (c)(1)(B)(i).) Finding no error occurred, we affirm the juvenile court's orders.

I

FACTS AND PROCEDURAL HISTORY

A. The minor's detention by the juvenile court

The minor initially became involved with the juvenile court in April 2017 when he was eight months old. His then 12-year-old half sister was found drunk and unconscious on a sidewalk. Respondent Orange County Social Services Agency (SSA) filed a juvenile dependency petition, alleging a substantial risk of harm to the minor and his sister based upon their parents' failure or inability to adequately supervise or protect the children. At that time, the sister was admitted to Orangewood Children and Family Center, but the court allowed the mother to retain custody of the minor.³

Years before the petition, the mother underwent six months of drug

¹ The father joins in the arguments set forth by the mother based upon the mother's relationship with the minor, without advancing any unique substantive arguments. Accordingly, our analysis of the mother's appeal in this case applies to the entirety of the father's appeal as well.

² Further statutory references are to the Welfare and Institutions Code.

³ There is no dispute regarding any order relating to the sister on this appeal. Consequently, we do not discuss the circumstances regarding her dependency case in this opinion.

treatment classes. In 2015, prior to the minor's birth, a criminal restraining order was issued against the father, protecting the mother and the minor's sister. In 2016, a criminal restraining order was issued against the mother's adult son, protecting the mother and son's girlfriend based upon domestic violence inflicted upon the women when both had been pregnant—the mother had been about seven months pregnant with the minor at that point. The mother believed her son had committed the violence under the influence of methamphetamine. Following this incident, the mother agreed to participate in a voluntary family services case based upon substantiated allegations of general neglect of her children, which included allowing the adult son to reside with her other children, despite knowing about the son's ongoing substance abuse and violent behavior issues. In February 2017, the case was closed due to the mother's refusal to participate. Later that month, the mother was arrested for possession of drug paraphernalia.

Despite the restraining order in effect, in March 2017, Fountain Valley Police responded to a complaint at a retail store and found the mother had given a ride to her adult son and his girlfriend to the store. The son and his girlfriend had engaged in a verbal argument which included aggressive behavior toward a store employee. When confronted, the son and girlfriend provided false names to the responding police officer. The officer confirmed the mother's identity in the parking lot and arrested both the son and his girlfriend on active warrants. The son's warrant was for a criminal case connected to his 2015 domestic violence incident and the girlfriend's warrant was based upon a criminal case alleging her possession of a controlled substance. In May 2017, the minor's father was arrested for violating his restraining order when he was found at the mother's residence. At that time, the father admitted to using methamphetamine that day, having an unresolved substance abuse problem, and previously smoking methamphetamine with the mother. Then in July 2017, the mother was again found in the company of her adult son and his girlfriend (while walking with the minor). The girlfriend had been living with the mother and tested positive for methamphetamine use

in May and July (the same month the girlfriend gave birth to her child).

That same month, July 2017, the juvenile court granted a protective custody warrant to remove the minor from the mother's care. The minor was placed in foster care and SSA filed a subsequent petition that alleged the history of substance abuse issues surrounding the mother, father, mother's adult son, and his girlfriend. In its detention hearing report, SSA cited the mother's history of being unable or unwilling to protect her children from exposure to domestic violence and substance abuse.

The juvenile court conducted its jurisdiction and disposition hearings for the minor on the same day. The minor's parents submitted the matter to the court on SSA's reports and the court found the allegations of SSA's subsequent petition to be true. The court declared the minor its dependent and vested custody of the minor with the SSA's director. The court approved SSA's recommended case plan and ordered visitations with the minor and family reunification services for both parents.

B. Reunification services

As the minor continued his placement in foster care, both parents were offered family reunification services for more than a year. As relevant here, the mother's reunification case plan required drug testing, substance abuse counseling, parenting classes, visits with the minor, and abstinence from illegal drugs. The case plan stipulated that a missed drug test would be considered a positive drug test. Despite these terms, SSA reported that, in the first six months of services, the mother twice tested positive for amphetamine and methamphetamine and missed drug testing appointments no less than 23 times. This was in addition to a period of more than two months during which the mother did not test without explanation. As to visitation, SSA reported the mother missed 10 visits with the minor and was at one point suspended by the visitation center for repeatedly failing to visit him. When a social worker arranged to visit the minor together, the mother did not appear and instead called to say she did not have money to

ride a bus to the visit.

During the next six-month period, SSA reported the mother again tested positive for methamphetamine use three additional times — this time during a period in which she was pregnant with another child. The mother also missed drug tests seven times and denied having a substance abuse problem, explaining she had only used methamphetamine in reaction to the death of her adult son, who was shot in January 2018. Again, the mother’s visitations with the minor were placed on hold due to attendance failures. Similar to the first six-month period, in one instance, the mother declined SSA’s invitation to visit the minor, claiming she had another unspecified appointment. During this same time period, SSA reported the minor, then about 21 months old, calling his foster parents “mama” and “papa.” The minor’s foster parents told the juvenile court they would like to adopt him.

On August 10, 2018, the juvenile court held a 12-month review hearing. The court determined SSA had provided reasonable reunification services but that returning the minor to the mother’s custody would create a substantial risk to his safety, protection, or physical or emotional well-being. Reunification services for both the mother and father were terminated. The father had made no progress and the court emphasized the mother’s lack of significant progress in resolving her substance abuse issue. The court then set a permanency planning hearing pursuant to section 366.26 (the 366.26 hearing) to make a permanent placement determination for the minor.

Following the 12-month review hearing, the mother continued to miss drug tests — no less than three times — prior to receiving a medical order for one month of bed rest. Also, the mother missed approximately five additional visits with the minor. During one visit with the mother, when the minor looked for “momma” he appeared to be looking for his foster mother.

C. Denials of section 388 petition and parental benefit exception

On February 25, 2019, one day before the 366.26 hearing, the mother filed a section 388 petition requesting the juvenile court to modify parts of its August 10 order. Specifically, the mother requested the minor be returned to her care with additional reunification services. Among other things, the mother's supporting declaration alleged she had maintained sobriety for over eight months, maintained visits with the minor, was actively engaged in various programs, and had completed counseling courses. Her petition included three exhibits. Two documented the mother's participation in substance abuse and counseling programs. The third exhibit was comprised of various medical treatment records, including one order for bed rest between November 19 and December 20, 2019.⁴

The juvenile court denied the mother's section 388 petition without an evidentiary hearing, finding the proffered information showed, at best, changing circumstances and not changed circumstances. Further, the court found no prima facie showing that the mother's requested modifications would be in the minor's best interests. After denying the section 388 petition, the court conducted as scheduled the 366.26 hearing. The mother argued her visits and relationship with the minor justified a parental benefit exception to placing the minor for adoption, pursuant to section 366.26, subdivision (c)(1)(B)(i). The court rejected this argument, stating that, although it appeared the mother had made her best efforts, she had missed visits with the minor and the evidence did not demonstrate the mother was a parental figure to him. At the conclusion of the hearing, the court found the minor to be adoptable, terminated the parental rights of both the mother and father, and ordered a permanent plan of adoption

⁴ The order was incongruous with the mother's petition allegation that she was on bed rest from December 10, 2019 to January 11, 2019 but the discrepancy is immaterial to the disposition of this appeal.

for him.

II

DISCUSSION

A. Summary denial of section 388 petition was an not abuse of discretion

The minor's parents argue the juvenile court erred in denying the mother's section 388 petition without an evidentiary hearing. Section 388 allows a parent to petition a juvenile court to hold an evidentiary hearing to determine whether to change, modify, or set aside a prior order as the court deems proper. (§§ 385, 388.) "The petitioning party has the burden of showing, by a preponderance of the evidence, that there is a change of circumstances or new evidence, *and* the proposed modification is in the child's best interest. . . . [¶] '[I]f the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition.'" (*In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445.) After reunification services have been terminated, a child's best interests with respect to a section 388 petition includes the child's need for "permanency and stability" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317) and "[t]he prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition.'" (*In re Daniel C.*, at p. 1445.)

"In determining whether a petition makes the necessary showing, the court may consider the entire factual and procedural history of the case." (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 258.) Allegations in a petition that are unsubstantiated or conclusory are insufficient to warrant a hearing. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250-251.) Also, a showing that circumstances are changing as opposed to changed is insufficient to warrant a hearing on a section 388 petition. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) A denial of a section 388 petition without an evidentiary hearing is reviewed for an abuse of discretion, which will be upheld unless

the juvenile court “exceeded the bounds of reason by making an arbitrary, capricious or patently absurd determination.” (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 642.) A court’s order is presumed correct and an appellant has the burden to demonstrate reversible error. (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

The mother analogizes this case to *In re Jeremy W.* (1992) 3 Cal.App.4th 1407 (*Jeremy*) to argue the juvenile court abused its discretion in not conducting an evidentiary hearing on her petition. *Jeremy* involved a section 388 petition supported by uncontradicted information that the parent had resolved the single remaining issue of unstable living accommodations which had been the basis of the court’s termination of reunification services. (*Id.* at pp. 1415-1416.) Accordingly, the mother’s argument in this case would require a finding she had successfully addressed all concerns regarding her drug use. We find any such assertion untrue. As the court correctly noted, the mother’s own proffered documentation showed she continued missing drug tests following the court’s termination of reunification services — at least three times in three months, under a liberal view of the mother’s petition.⁵ These missed tests can be considered positive test results (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1217), especially in the context of the mother’s history of positive drug test results. Accordingly, in contrast to *Jeremy*, the record in this case is clear that the mother’s petition had *not* shown sufficiently changed circumstances regarding her substance abuse issue, a primary ground for the juvenile court’s termination of her reunification services.

The significance of the mother’s substance abuse is illustrated in *In re Marcelo B.*, *supra*, 209 Cal.App.4th at pages 641-642, where a father with a history of alcohol abuse made a section 388 petition which was also denied by a juvenile court without an evidentiary hearing. The appellate court affirmed the denial, finding that

⁵ All of these missed drug tests occurred between the August 10, 2018 termination of reunification services and the November 19, 2018 bed rest order contained in the medical records exhibit of the mother’s petition.

despite the “[f]ather’s participation in 12-step meetings, completion of a substance abuse program and attendance at parenting classes . . .” such facts did not establish a prima facie showing of changed circumstances given the father’s prior history with treatment for alcoholism and subsequent relapse. (*Id.* at p. 642.) Similarly in the present case, the mother’s continuing history of substance abuse and relapse was well documented. The mother had received six months of drug treatment and yet, after removal of the minor from her custody, repeatedly tested positive for methamphetamine use and missed other tests. (*In re Christopher R.*, *supra*, 225 Cal.App.4th at p. 1217.)

Coupled with the mother’s denial of having a substance abuse issue — another similar characteristic noted about the father in *Marcelo* (*In re Marcelo B.*, *supra*, 209 Cal.App.4th at p. 642) — the history of this case provided more than reasonable grounds for a juvenile court to conclude the mother’s circumstances had not sufficiently changed regarding her substance abuse issue. Indeed, the mother’s proffered exhibits showed she had not even completed her substance abuse program, as the father had done in *Marcelo*. (*Id.* at p. 641.) Finally, even by liberally viewing the mother’s drug testing as being excused starting November 19, 2018 — pursuant to the medical order for bed rest contained in her petition exhibit — the resulting 100-day period of abstinence (ending on February 26, 2019, when the section 388 petition was considered by the court) could reasonably have been found an insufficient period of time to demonstrate changed circumstances regarding substance abuse. (See *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 [“It is the nature of addiction that one must be ‘clean’ for a much longer period than 120 days to show real reform”]; *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424 [200 days of sobriety not enough].) Accordingly, the court’s exercise of discretion in this matter was consistent with existing case law in finding the mother had shown circumstances that were changing (instead of changed) for the purposes of ruling on her section 388 petition.

The mother attempts to factually distinguish *Marcelo* by characterizing her initial loss of custody of the minor as being caused by her contact with her adult son, in violation of his criminal protective order, and not because of substance abuse. Her characterization ignores the reality that the risk to the minor posed by her adult son was connected to substance abuse. Indeed, the mother acknowledged her son's ongoing substance abuse issue prior to his death and agreed with his girlfriend's belief that the son's domestic violence — which led to the criminal protective order underlying the mother's initial loss of custody of the minor — had been committed while the son had been under the influence of methamphetamine. The mother's characterization also ignores the fact that the girlfriend was also cited by SSA as a documented source of substance abuse risk for the minor.

More importantly, the mother's argument is unpersuasive because whatever progress she may have made regarding domestic abuse — whether with respect to her relationship with her adult son or the minor's father — such progress was necessary but insufficient to demonstrate the changed circumstances needed to entitle the mother to an evidentiary hearing on her section 388 petition in this case. In other words, even if the mother's claims of progress in other areas of her life — such as domestic violence, housing, and counseling — were true,⁶ such claims were insufficient to demonstrate the required change in substance abuse circumstances that led to the minor's involvement with the juvenile court. (See *In re A.A.* (2012) 203 Cal.App.4th 597, 612 [mother's completion of various services and programs did not represent changed circumstances

⁶ It is not a given that progress in even these areas was demonstrated. For example, contrary to her declaration assertions, the mother's petition demonstrated an incomplete engagement with counseling services. The "Termination Report" for "Counseling and Parent Education Services," attached as an exhibit to the mother's petition, indicated the mother needed further progress regarding her development of parenting skills to protect her children from domestic violence.

supporting modification of the court order denying her reunification services, where the primary cause that led to her children's removal remained ongoing].)

Accordingly, the mother's argument does not compel a conclusion that the juvenile court abused its discretion in this case when it denied the mother's petition without an evidentiary hearing. It was within reason for the juvenile court to find that, even under a liberal construction, the mother's petition allegations were unsubstantiated — even contradicted — and failed to demonstrate sufficiently changed circumstances as to the substance abuse that led to her loss of custody of the minor and the termination of reunification services that were made available to her.

The mother also failed to satisfy the prima facie showing requirement for a section 388 petition because she did not demonstrate how her requested modifications would have promoted the minor's best interests. In *Jeremy*, by contrast, the mother had proffered a bonding study to argue that severing her parental rights presented a significant risk of harm to her child. (*Jeremy*, *supra*, 3 Cal.App.4th at p. 1415.) Here, the only information proffered by the mother was her assertion that she was “extremely bonded” to the minor. This was a conclusory statement and insufficient to establish the mother's prima facie showing. (*In re Anthony W.*, *supra*, 87 Cal.App.4th at p. 251.) Moreover, the statement was contradicted by the record's documentation of the minor exhibiting a weak bond with the mother during some of the visits that occurred. Finally, the mother's petition did not address how her requested modifications would have furthered the minor's need for “permanency and stability.” (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) In sum, the mother has not demonstrated the juvenile court abused its discretion when it denied the mother's section 388 petition without an evidentiary hearing.

B. The court did not err in finding the parental benefit exception did not apply

The minor's parents argue the juvenile court also erred in determining that a parental benefit exception did not apply to the minor's permanent placement plan. "The express purpose of a section 366.26 hearing is 'to provide stable, permanent homes' for dependent children. (§ 366.26, subd. (b).) Once the court has decided to end parent-child reunification services, the legislative preference is for adoption." (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 645.) If a child is found to be adoptable, "the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to the child.'" (*Ibid.*)

The parental benefit exception to adoption has two prongs a parent must satisfy by a preponderance of the evidence: (1) the parent regularly visited the child; and (2) the benefit to the child of maintaining the parent-child relationship outweighed the benefit of adoption. (§ 366.26(c)(1)(B)(i).) The first prong simply asks "whether visitation occurred regularly and often" (*In re Grace P.* (2017) 8 Cal.App.5th 605, 612-613) and a juvenile court's determination regarding this issue is reviewed under the substantial evidence standard of review. (*In re Breanna S., supra*, 8 Cal.App.5th at p. 647.) We do not "reweigh the evidence" (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947) but instead, "presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) Indeed, given that the burden of proof at the juvenile court level rests with the party asserting the exception, appellate review of the court's determination that the burden was not carried "becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.'" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

The mother has not met her burden to show that she regularly visited the minor. (See *In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 647 [first prong of regular visitation was not satisfied where mother sporadically visited and cancelled visits, even though visits “became more regular during the final six months before the section 366.26 hearing”].) As discussed above, the record contained repeated examples of the mother *not* consistently attending visits permitted by the juvenile court, indeed resulting in her visitation status being placed on hold on more than one occasion. It is clear the mother only sporadically visited the minor for significant spans of time. For example, she does not dispute visiting the minor only seven times total during the first five months of 2018. According to the court’s visitation order, 40 visits were authorized for this time period. Based upon this record, the mother cannot compel a conclusion that the court had no choice but to find that she had satisfied the first prong of the parental benefit exception. (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.) Since this first prong was not satisfied, there is no need for this court to consider the court’s findings regarding the mother’s inability to satisfy the second prong. (*In re Breanna S.*, at pp. 646-647 [“The court’s decision a parent has not satisfied [the parental benefit exception] burden may be based on any or all of the component determinations”].)

While it is apparent the mother loves the minor (as the juvenile court stated), she has not demonstrated that the court committed any reversible errors. The court acted within its discretion in denying the mother’s section 388 petition without an evidentiary hearing and the evidence did not compel an application of the parental benefit exception in place of a plan for the minor’s adoption.

III

DISPOSITION

The orders are affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.